

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 20.12.2007

Coram :

THE HONOURABLE MR.JUSTICE K.RAVIRAJA PANDIAN
and
THE HONOURABLE MRS.JUSTICE CHITRA VENKATARAMAN

Original Side Appeals Nos.220 and 232 of 2007

S.K.A.Abdul Kader

Appellant in both
the appeals

v.

Vijayalakshmi

Respondent in both
the appeals

Appeal filed under Order XXXVI Rule 9 of the Original Side Rules read with Clause 15 of the Letters Patent against the orders of the learned single Judge dated 30.07.2007 in Applications Nos.2232, 222 and 4124 of 2007 in O.P. No.566 of 2005 and dated 05.01.2007 made in O.P. No.566 of 2005.

For Appellant : Mr.N.R.Chandran,
Senior Counsel, for
Mr.Chandra Kanthan

For Respondent : Mr.V.Raghavachari

JUDGMENT

K.RAVIRAJA PANDIAN, J.

These two appeals are filed by the appellant, an agreement holder against the orders of the learned single Judge - one dated 05.01.2007 made in O.P. No.566 of 2005 and the other dated 30.07.2007 made in common in Applications Nos.2232, 222 and 4124 of 2007.

2. The material facts for the purpose of disposal of the appeals are as follows :

One Govindakutty Menon was the owner of the property admeasuring 6528 sq. ft., bearing door No.78, Lattice Bridge Road, Adyar, Chennai. The said Govindakutty Menon died on 16.04.1992, leaving behind him his wife Vijayalakshmi, the

respondent in these appeals and three sons - G.Ramesh, G.Suresh and G.Sathish. G.Sathish died unmarried on 13.05.1995, whereas the other son G.Ramesh died on 26.09.1999 leaving behind his wife Meera Ramesh, Minors Nivedha Ramesh and Krishnan Ramesh. The wife of Ramesh, Meera Ramesh also died on 14.01.2005 leaving her two children Nivedha and Krishnan as her heirs. After the death of GovindaKutty, Vijayalakshmi, the respondent herein, Ramesh and Sathish, who were then alive, along with Suresh, together borrowed a sum of Rs.20,00,000/- on 24.11.1993 and after the death of Sathish, the other three viz., Vijayalakshmi, Suresh and Ramesh, who was then alive together borrowed another sum of Rs.35,00,000/- on 22.11.1995 - both from M/s Park Town Benefit Fund by executing two simple mortgages over the said property. The property was brought to sale under section 69 of the Transfer of Property Act consequent to non payment of the liability and one B.Murugeswaran purchased the property in the auction sale. The respondent Vijayalakshmi and her son G.Suresh challenged the auction sale proceedings in O.S. No.3419 of 2003 on the file of the V Assistant City Civil Court, Chennai.

3. While the matter stood so, the respondent Vijayalakshmi, G.Suresh, the plaintiffs in O.S. No.3419 of 2003 and M/s. Park Town Benefit Fund Ltd., have entered into a compromise agreement with the auction purchaser Murugeswaran in and by which the auction purchaser had agreed to relinquish his right over the property on receipt of Rs.55,00,000/- and that M/s. Park Town Benefit Fund Ltd., had agreed to discharge the liability in relation to the above mortgage deeds dated 24.11.1993 and 22.11.1995. In those circumstances of the matter, the respondent Vijayalakshmi, who is entitled to 18/32 share in the said property, on her behalf and on behalf of the minors who are entitled to 3/32 share each and G.Suresh, who is entitled to 8/32 share, entered into an agreement on 22.03.2005 to sell away the entire property for a total sale consideration of Rs.1,50,00,000/- to the appellant. The appellant paid Rs.50,000/- as advance to the respondent and another sum of Rs.54,50,000/- by way of A/c payee cheque drawn on Indian Bank in favour of Vijayalakshmi to enable her to make the payment to Park Town Benefit Fund and thus the amount was paid and the mortgage was discharged. In the agreement dated 22.03.2005, the respondent agreed to obtain permission of the competent Court for sale of the minors' share in the property and also put the appellant in possession of the ground floor of the property on 16.09.2004.

4. In order to comply with the obligation on the part of the respondent, the respondent Vijayalakshmi filed O.P.No.566 of 2005 before this Court under sections 3, 7 to 10 and 29 of the Guardian and Wards Act, 1890 and under Order XXI Rules 2 and 3 of the Original Side Rules seeking the following relief before this Court :

a. appoint the respondent (petitioner in OP.566/2005) as guardian for the person and the property of the minors Nivedha and Krishnan.

b. grant permission to her for the sale of the property of the minors share described in the schedule to petition.

c. permit the respondent Vijayalakshmi to withdraw the interest amount accrued on the share amount of the minors agreed to be deposited in the bank for education and maintenance of the minor children.

5. This Court, by its order dated 13.09.2005 appointed the respondent as the legal guardian for the person and property of the minors Nivedha and Krishnan. While considering the second relief of permitting the guardian so appointed to sell the minors' share of the property, this Court, in order to find out, whether the consideration stated in the agreement in a sum of Rs.1,50,00,000/- is fair and reasonable, appointed an Advocate Commissioner on 06.03.2006 with the direction to visit the property and to value the same taking into consideration the guideline value with the assistance of an Engineer and file a report. The Advocate Commissioner so appointed filed his report on 05.04.2006 in which the value of the property was assessed at Rs.2,39,61,387/-.

6. The learned single Judge, having regard to the value of the property stated in the report of the Advocate Commissioner with reference to the sale consideration mentioned in the agreement, was of the view that permitting the respondent to sell the share of the minors for the said amount would not be in the best interest of the minors and declined to permit the petitioner to sell the petition schedule property to the agreed price of Rs.1,50,00,000/-, however, observed that if the appellant, the intending purchaser is agreeable to purchase the property for the sum as valued by the Advocate Commissioner, the respondent was directed to enter into a fresh agreement with the intending purchaser and approach the Court for appropriate orders. While so holding, in paragraph 10 of the order, the learned Judge has rejected the application as follows :

"In the result, the permission is rejected to sell the property to the intending purchaser for a sum of Rs.1,50,00,000/-"

7. The appellant-intending purchaser, who has parted with a sum of Rs.55,00,000/- filed three applications before the learned single Judge in A. No.2232 of 2007 seeking to implead him as respondent in O.P. No.566 of 2005, A.No.222 of 2007 seeking for an ad interim injunction restraining the respondent from alienating or encumbering the property mentioned in the schedule in any manner and A.No.4124 of 2007 to modify the order dated 05.01.2007 made in O.P. No.566 of 2005. Those applications were

hotly contested by the respondent herein by raising objection as to maintainability. The learned single Judge, upon consideration of the arguments advanced by the respective parties, dismissed those applications on the premise that the appellant is a third party to the application filed under sections 3, 7 to 10 and 29 of the Guardian and Wards Act, 1890, which was finally disposed of on 05.01.2007, could not be impleaded by reopening the petition, however, gave liberty to the appellant to file an appeal against the order dated 05.01.2007 made in OP. No.566 of 2005 in accordance with law.

8. Accordingly, the appellant filed M.Ps. Nos.1 and 2 of 2007 in O.S.A. SR. No.61753 of 2007. M.P. 1 of 2007 is for grant of leave to the appellant to file an appeal against the order dated 05.01.2007 made in O.P. No.566 of 2005 and M.P.2 of 2007 was filed to condone the delay of 190 days in filing the appeal. The appellant also filed an appeal in O.S.A.No.220 of 2007 against the order of the learned single Judge dated 30.07.2007 dismissing the applications filed by the appellant. In the miscellaneous petitions M.Ps.1 and 2 of 2007, the First Bench of this Court has granted leave to the appellant to file an appeal and also condoned the delay in filing the appeal by its orders dated 18.08.2007 and 28.08.2007 respectively. Accordingly, the SR was numbered as O.S.A.No.232 of 2007. Thus, both the appeals are before us.

9. Mr.N.R.Chandran, learned senior counsel appearing for the appellant submitted that O.P.No.566 of 2005 has been filed under sections 3, 7 to 10 and 29 of the Guardian and Wards Act seeking permission to sell away that portion of the immovable property of the minors, pursuant to an agreement entered into with the appellant by the guardian appointed by this Court. The subject matter of the agreement is not confined to that portion of the immovable property of the minors alone, but the major portion of the property is the share of the respondent Vijayalakshmi and her son G.Suresh, in the sense that 26/32 (18/32 + 8/32) of the entire property. Even in the application filed in O.P. No.566 of 2005, the schedule of the property refers only to 6/32 share out of the entire land and building in door No.78, Lattice Bridge Road, Adyar, Chennai. If at all the learned Judge was of the view that the consideration quoted in the agreement is low, he would have rejected the relief in respect of 6/32 share alone and in respect of the remaining 26/32, the shares of Vijayalakshmi and G.Suresh for which no relief was sought for in the application, ought not to have rejected permission. The appellant, who has parted with the money is definitely an aggrieved person. That is the precise reason for the First Bench to grant the leave to appeal against that order. He further contended that in respect of that portion of the minors share, i.e., 6/32 share of the property, the appellant is willing to pay the price proportionately, as assessed by the Advocate Commissioner.

10. However, Mr.Raghavachari, learned counsel appearing for the respondent contended that the appeal is not maintainable. As per section 8(2)(a) of the Hindu Minority and Guardianship Act, 1956 only the natural guardian is authorised to lodge an application before the Court. The appellant, being a third party to the order of the learned single Judge, cannot maintain the appeal. For that proposition he relied on the decision of the Bombay High Court in the case of Shivamurti v. Vijaysing Vinayakrao, AIR 1972 Bom 152. Though certain other judgments have been annexed in the typed set of papers, no reference whatsoever was made to those judgments.

11. Heard the learned counsel on either side and perused the materials available on record.

12. Reference to the provisions of the Hindu Minority and Guardianship Act, 1956, in our view, cannot be accepted to non suit the appellant for filing the appeal. Section 2 of the Hindu Minority and Guardianship Act, 1956 provided that the provisions of that Act would be in addition to and not in derogation of the Guardian and Wards Act, 1890 and deemed to be incorporated in that Act in the manner and to the extent postulated by section 2 of the Hindu Minority and Guardianship Act. The judgment relied on by the appellant is also one under section 8(2) of the Hindu Minority and Guardianship Act, 1956 in which the powers of the natural guardian was dealt with. The respondent filed an application to appoint her as a guardian and permit her to sell that portion of the property belonging to the minors under sections 3, 7 to 10 and 29 of the Guardian and Wards Act. It is apparent that the said application in O.P. No.566 of 2005 has been filed only pursuant to the agreement dated 22.03.2005 with the appellant. Having obtained an order of guardianship for the person and property of the minors, and having admitted that the appellant has parted with a sum of Rs.55,00,000/- and was also put in possession in the ground floor of the property, the respondent, now cannot, contend that the provisions of the Hindu Minority and Guardianship Act, 1956 would apply and the appellant is incompetent to file the present appeal. Section 47 of the Guardian and Wards Act provides that an appeal shall lie to the Court from an order made under section 29 of the Act refusing permission. That provision does not in any manner restrict the person as to who is entitled to file an appeal. The person aggrieved by an order of the Court could not be left without any remedy to sort out his grievance. An appeal, in legal parlance, is held to mean the removal of a cause from an inferior or subordinate to a superior tribunal forum in order to test and scrutinize the correctness of the impugned decisions. It amounts in essence and pith to a complaint to a higher forum that the decision of the subordinate tribunal is erroneous and therefore liable to be rectified or set right. (vide C.W. Co-op Transport Society v. Punjab State, AIR 1962 Pun 94). On the face of the

language employed in section 47 of the Guardians and Wards Act, the objection as to maintainability has to be rejected and the same is rejected.

13. The order of the learned single Judge in rejecting the permission for selling away the property in entirety for a sum of Rs.1,50,00,000/- cannot be legally sustained, because, as stated already, in respect of the major share of the respondent Vijayalakshmi (18/32) and that of G.Suresh, her son (8/32) permission was not sought for from the Court under section 29 of the Guardian and Wards Act. In O.P. No.566 of 2005 the Court was not expected to pass any order permitting or rejecting permission to sell the major portion of the share belonging to the respondent and G.Suresh. Permission was sought for only in respect of the minors' share, i.e., 6/32 share of the property. Hence, the order of the learned single Judge made in respect of the property covered under the agreement cannot be legally sustained, having regard to the relief sought for in the O.P. No.566 of 2005, i.e., permission to effect sale of the minors 6/32 share as mentioned in the schedule to the petition. Hence, the order of the learned single Judge is modified and confined to 6/32 share of the total extent, belonging to the minors, as mentioned in the schedule to the petition. With this modification, O.S.A. No.232 of 2007 is disposed of. This order would not preclude the parties to settle the price of the minors share, as valued by the Advocate Commissioner and as suggested by Mr.N.R.Chandran, learned Senior Counsel for the appellant, in his argument.

14. In view of the order passed in O.S.A.No.232 of 2007, virtually nothing remains to be decided in O.S.A.No.220 of 2007, however, on merits, we are not able to find any fault with the order of the learned single Judge for the reasons stated therein. Hence, the appeal in O.S.A.No.220 of 2007 is dismissed. No costs. The connected miscellaneous petitions are closed.

Mf

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To

1. The Sub Asst Registrar,
OS, High Court, Madras.

2. The Section Officer,
Record Section, OS,
High Court, Madras.

+ 1 cc to Mr. V. Raghavachari, Advocate SR No. 75702

+ 2 cc to Mr. V. Chandrakanthan, Advocate SR No. 75740

O.S.A.No.220 and 232 of 2007

VC(CO)
SR/2.1.2008



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